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No. 97-884

In the Supreme Court of the United States

OCTOBER TERM, 1997

VYTAUTAS GECAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a witness may invoke the Fifth Amendment privilege against compelled self-incrimination based solely on a fear of prosecution by a foreign country.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-156a) is reported at 120 F.3d 1419. The vacated opinion of the panel of the court of appeals (Pet. App. 159a-201a) is reported at 50 F.3d 1549. The opinion of the district court (Pet. App. 202a-246a) is reported at 830 F. Supp. 1403.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1997. The petition for a writ of certiorari was filed on November 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1991, the Department of Justice issued an administrative subpoena to petitioner, a resident alien born in Lithuania, to appear for a sworn interview to answer questions relating to his activities in Europe during World War II and his subsequent immigration to the United States. At the interview, petitioner invoked the Fifth Amendment privilege against compelled self-incrimination and refused to answer any questions about his wartime activities or his immigration to the United States. The district court granted the government's petition to enforce the subpoena. Pet. App. 202a-246a. A panel of the court of appeals reversed and remanded for further proceedings. *Id.* at 159a-201a. On rehearing, the court of appeals sitting en banc affirmed the district court's order enforcing the subpoena. *Id.* at 1a-156a.

1. Petitioner is a resident alien of Lithuanian nationality. On August 2, 1962, he submitted an application for an immigrant visa and alien registration at the American Consulate in Liverpool, England. On his application, he stated that he had been a "pupil" in Lithuania from 1938 through 1944 and that he had lived in a refugee camp in Germany from 1944 to 1947. He swore under oath that the answers on his immigrant visa application were true and correct. Pet. App. 3a, 203a; Gov't C.A. Br. 3-4.

Based on those answers, petitioner was granted an immigrant visa. On October 23, 1962, he immigrated to the United States from England pursuant to the Immigration and Nationality Act, 8 U.S.C. 1201. He currently resides in Florida. Pet. App. 3a-4a, 203a; Gov't C.A. Br. 3-4.

The Office of Special Investigations of the Department of Justice (OSI) is investigating whether petitioner illegally obtained admission to the United States by concealing assistance in Nazi persecution during World War II. OSI suspects that petitioner was not a student in Lithuania or a resident of a refugee camp in Germany between 1940 and 1945. Rather, OSI suspects that petitioner was a member of the 2d/12th Lithuanian *Schutzmannschaft* Battalion, an armed auxiliary police unit that assisted the forces of Nazi Germany in the persecution of persons because of their race, religion, or political opinion. Pet. App. 4a, 203a; Gov't C.A. Br. 4.[1]

In 1991, OSI issued an administrative subpoena requiring petitioner to appear for a sworn interview and to produce documents relating to his activities in Europe during World War II and his immigration to the United States in 1962. At the interview, petitioner refused to answer any questions concerning his wartime activities or his immigration to the United States. He claimed that he had a right not to do so based on the Fifth Amendment privilege against compelled self-incrimination. He did not contend that his responses to OSI inquiries could incriminate him in any domestic prosecution.[2] Rather, he contended

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[1] If petitioner did assist the forces of Nazi Germany in persecuting persons because of their race, religion, national origin, or political opinion, he would be subject to deportation under 8 U.S.C. 1182(a)(3)(E) and 1227(a)(4)(D). Pet. App. 4a. He would also be subject to deportation under 8 U.S.C. 1182(a)(6)(C)(i) and 1227(a)(1)(A) for lying under oath on his immigrant visa application about his activities during World War II.

[2] Because a deportation proceeding is a civil action and not a criminal prosecution, petitioner "does not have a Fifth

that those responses could subject him to prosecution in Lithuania, Israel, and Germany. Pet. App. 5a, 204a-205a; Gov't C.A. Br. 5-6.[3]

The government filed a petition for enforcement of the subpoena pursuant to 8 U.S.C. 1225(a) (1994). The district court granted the petition and ordered petitioner to testify. Pet. App. 202a-246a. Although the court found that petitioner "face[s] a real and substantial danger of foreign prosecution" in Israel, Germany, and Lithuania (*id.* at 206a, 210a-217a), the court held that petitioner could not invoke the Fifth Amendment privilege to avoid giving testimony that would incriminate him solely in a foreign prosecution (*id.* at 224a-246a).

2. A panel of the court of appeals reversed and remanded for further proceedings. Pet. App. 159a-201a. The panel concluded that the testimony that

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Amendment right to refuse to answer questions posed to him for fear that such information might be used to deport him." *United States* v. *Balsys*, 119 F.3d 122, 126 (2d Cir. 1997), petition for cert. pending, No. 97-873 (filed Nov. 24, 1997); see Pet. App. 16a (observing that "the Supreme Court has never extended the Self-Incrimination Clause to deportation proceedings").

[3] In 1992, Lithuania adopted a statute authorizing prosecution of Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II. See Pet. App. 10a & n.7, 213a. Israel imposes the death penalty on persons who, "during the period of the Nazi regime in an 'enemy' country, committed acts constituting a crime against the Jewish people." *Id.* at 210a; see also *id.* at 7a-9a & n.5. Germany has prosecuted persons suspected of crimes against Jews and others during World War II under its murder statute, although it is uncertain whether the statute may be applied to non-German citizens alleged to have committed murder outside Germany. *Id.* at 9a-10a & n.6, 211a-212a.

OSI sought from petitioner "would inevitably tend to incriminate him under the laws of Israel and Lithuania." *Id.* at 174a. It further concluded that petitioner "legitimately possesses a 'real and substantial fear' of prosecution from Lithuania or Israel" (*id.* at 189a), because he could be extradited to one of those countries based on his testimony (*id.* at 183a-186a), OSI could disclose his testimony to those countries (*id.* at 176a-183a), and those countries had indicated some present intention to prosecute Nazi collaborators (*id.* at 186a-189a). The panel held that a witness who has such a real and substantial fear of prosecution in a foreign country may assert the Fifth Amendment privilege against compelled self-incrimination to avoid giving testimony in a domestic proceeding. *Id.* at 189a-196a.

The panel noted that the Fourth Circuit had refused to allow a witness to invoke the Fifth Amendment privilege based on a fear of foreign prosecution, reasoning that "the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained * * * from compelling self-incrimination." Pet. App. 191a (quoting *United States* v. *Under Seal (Araneta)*, 794 F.2d 920 (4th Cir.), cert. denied, 479 U.S. 924 (1986)). The panel suggested that *Araneta* was not necessarily inconsistent with its holding in this case. The panel concluded that "the United States government essentially is both the compelling and the using sovereign" in petitioner's case as a consequence of its "agreement with Lithuania to affirmatively assist it in obtaining information regarding suspected Nazi collaborators and to aid it in prosecuting these people." *Id.* at 197a.

3. On rehearing en banc, the full court of appeals affirmed the district court's order enforcing the subpoena. Pet. App. 1a-88a. It agreed that the testimony that OSI sought from petitioner would incriminate him under the laws of Israel, Germany, and Lithuania (*id.* at 11a), and that petitioner "faces a real, substantial, reasonable, and appreciable fear of foreign conviction" (*id.* at 14a). The court held, however, that a prosecution is not a "criminal case," within the meaning of the Self-Incrimination Clause, if it does not occur in a jurisdiction that is subject to the Fifth Amendment. *Id.* at 15a-23a, 88a. Because petitioner faced a danger of prosecution and conviction only by countries that are not bound by the Fifth Amendment, the court concluded that the "Self-Incrimination Clause does not extend to [petitioner's] real and substantial fear of a foreign conviction." *Id.* at 88a. The court acknowledged (*id.* at 15a) that the Second Circuit had recently reached a contrary conclusion in *United States* v. *Balsys*, 119 F.3d 122 (1997), petition for cert. pending, No. 97-873 (filed Nov. 24, 1997).

The court of appeals rejected petitioner's reliance on *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52 (1964), which holds that the Fifth Amendment privilege "protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Id.* at 77-78. The court explained that *Murphy*'s holding that a witness may invoke the privilege in the compelling jurisdiction based on a fear of prosecution in the using jurisdiction "was *inextricably tied* to a simultaneous decision applying the Self-Incrimination Clause to both jurisdictions." Pet. App. 26a (citing *Malloy* v. *Hogan*, 378 U.S. 1 (1964)). The court also rejected peti-

tioner's claim that he was entitled to invoke the privilege because the United States was both the compelling and the using sovereign in this case. *Id.* at 30a-31a. The court reasoned that a foreign government would not become the "agent" of the United States simply by requesting and receiving information developed by OSI. *Ibid.*

Finally, the court rejected petitioner's contention that the "main purpose" of the privilege is to protect an individual's privacy and dignity, and thus that an individual should be allowed to invoke the privilege "regardless of where the infliction of criminal penalties will occur." Pet. App. 33a. Based on an extensive review of the history of the privilege against self-incrimination (*id.* at 33a-87a), the court concluded that "the Fifth Amendment's Self-Incrimination Clause was intended as a limitation on the investigative techniques of government, not as an individual right against the world" (*id.* at 85a-86a).

Judge Edmondson specially concurred. Pet. App. 88a-90a. He found that the historical record did not indicate "with a reasonable degree of certainty that the Fifth Amendment was intended to reach foreign criminal actions." *Id.* at 90a. Accordingly, he concluded that the courts were obligated to apply the traditional rule that "the public has a right to every person's testimony," rather than the exception contained in the Fifth Amendment. *Id.* at 88a, 90a.

Five of the court's eleven judges dissented. Pet. App. 90a-156a. Judge Birch, the author of the panel opinion, acknowledged that "equally internally consistent and logical argument[s]" can be made on either side of the issue. *Id.* at 95a-96a. He nonetheless concluded that "[t]he force of history and the policies underlying the constitutional right against self-

incrimination" compelled the conclusion that "*our* government cannot force a person to answer questions if that person has a real and substantial fear of prosecution, whether domestic or foreign." *Id.* at 96a.

Judge Carnes separately dissented. Pet. App. 90a-92a. He reasoned that the Self-Incrimination Clause should, at least, "prevent the United States government from doing indirectly, while acting as the 'alter ego' of foreign prosecutors, what it could not do directly." *Id.* at 92a. He concluded that the United States was acting as an "alter ego" in this case by "actively assisting foreign countries in their criminal investigations of [petitioner] in order to further his prosecution in those countries." *Ibid.* In addition, Judge Carnes "suggest[ed] with appropriate deference that this issue * * * is one that the Supreme Court might wish to review and decide." *Ibid.*

DISCUSSION

Petitioner contends (Pet. 2-5) that the court of appeals erred in holding that a witness may not invoke the Fifth Amendment privilege against compelled self-incrimination based solely on a fear of prosecution by a foreign country. The court of appeals' decision in this case is consistent with the decisions of the Fourth Circuit in *United States* v. *Under Seal (Araneta)*, 794 F.2d 920, 925-928, cert. denied, 479 U.S. 924 (1986), and the Tenth Circuit in *In re Parker*, 411 F.2d 1067, 1070 (1969), vacated as moot, 397 U.S. 96 (1970). As petitioner points out (Pet. 3), however, the court of appeals' decision directly conflicts with the Second Circuit's recent decision in *United States* v. *Balsys*, 119 F.3d 122, 126 (1997). On November 24, 1997, we filed a petition for a writ of certiorari seeking review of the Second

Circuit's decision in that case. *United States* v. *Balsys*, No. 97-873. Because the question presented in this case is identical to the question presented in *Balsys*, the Court should hold the petition in this case pending its disposition of the petition in *Balsys*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *United States* v. *Balsys*, No. 97-873, and then disposed of accordingly.

Respectfully submitted.

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